DISTRICT COURT, COUNTY OF WELD STATE OF COLORADO Court Address: 901 9th Ave. PO Box 2038 Greeley, CO 80632-0138	
COLORADO OIL & GAS ASSOCIATION, COLORADO OIL AND GAS CONSERVATION COMMISSION, TOP OPERATING COMPANY Plaintiffs, v. CITY OF LONGMONT, COLORADO Defendant Defendants-Intervenors: OUR FUTURE, OUR LONGMONT; SIERRA CLUB; FOOD AND WATER WATCH; EARTHWORKS	▲ **COURT USE ONLY** ▲
Plaintiff TOP Operating Attorney: Thomas J. Kimmell, Reg. No. 9043 Zarlengo & Kimmell, PC 1775 Sherman Street, Suite 1375 Denver, CO 80203 Telephone 303 832 6204 Fax 303 832 6401 Email Kimmell01@aol.com	Case No.: 2013CV63 Courtroom: 3
TOP OPERATING COMPANY'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	

Plaintiff-Intervenor TOP Operating Company ("TOP") hereby files this Reply Brief in Support of its Motion for Summary Judgment. As set forth in more detail below, no genuine issues of material fact exist; the ban on hydraulic fracturing passed by Longmont directly conflicts with state policy which allows hydraulic fracturing; the local prohibition of this technical aspect of oil and gas operations is impliedly preempted; and as a matter of firmly established Colorado case law, Longmont's ban should be declared invalid as preempted by state law.

I. STATEMENT OF UNDISPUTED FACTS

1. TOP Operating's Interests in Longmont. TOP Operating Co. ("TOP") is a Colorado corporation that owns oil and gas interests and operates oil and gas wells in Colorado. The principal holdings of TOP, which consist of undrilled lease acreage and producing oil and gas wells, are located within or adjoining to the City of Longmont. See Affidavit of Murray Herring attached hereto as Exhibit B, paragraph 2, to TOP's Motion for Summary Judgment. These oil and gas assets are located within the Wattenberg field

2. 2012 Contracts between TOP and Longmont. In the summer of 2012 after lengthy negotiations, the City of Longmont, acting through its City Council and Mayor, entered into contracts with TOP providing for TOP's development of its oil and gas leases in Longmont. These contracts expressly include oil and gas development on both surface and of mineral rights owned by Longmont and consist of the Master Contract dated August 8, 2012 and Operator's Agreement dated July 17, 2012 (corrected versions attached hereto as Exhibit D).

3. Longmont expressly permits hydraulic fracturing in its 2012 Contracts with TOP. In these 2012 contracts, as to Longmont's mineral rights, Longmont ratified the validity of previous oil and gas leases previously taken by TOP in which Longmont had succeeded to a mineral/royalty interest and executed three new oil and gas leases to TOP on other minerals owned by Longmont. In addition to leasing its mineral rights, Longmont contracted for TOP's use of certain of Longmont's surface properties to conduct its oil and gas operations. These contracts expressly provide for TOP's right to conduct all oil and gas operations, expressly including fracking and re-fracking operations, on

Longmont's surface locations. In particular, Paragraph 1.b of the Operator's Agreement states, in pertinent part, as follows:

> Subject to the terms and conditions of the Contract and this Agreement, **the Sites shall be made available to the Company for its use and in their present condition for all oil and gas operations to be conducted by the Company in accordance with this Agreement and the Contract, which operations may include,** but are not limited to, drilling, completion, and maintenance of wells and equipment, production operations, workovers, well recompletions and deepenings, **fracturing, re-fracturing,** twinning, and drilling of replacement wells and the location of associated oil and gas production and drilling equipment and facilities ("Operations"). (Emphasis added.)
>
> Operator's agreement, attached hereto as Exhibit D, p. 1.

4. **Inconsistent nature of Longmont claims.** Only a few months after execution of these contracts, in November 2012, the Longmont voters passed Resolution R-2012-79, which contains an absolute and permanent ban on any hydraulic fracturing operations within Longmont. It goes without saying the current claims in Longmont's Brief as to the environmental hazards associated with fracking and as to TOP's inability to safely operate were not believed by Longmont's City Council and Mayor in July and August 2012, when these contracts were executed, and these claims are entirely inconsistent with the contracts and determinations made in the summer of 2012 by Longmont in expressly allowing fracking and other oil and gas operations by TOP on Longmont owned properties.

5. TOP's practice and intent to hydraulically fracture all TOP's oil and gas wells in the Wattenberg Field. For the last twenty to thirty years, all wells drilled by TOP and virtually, if not all, wells drilled by other operators in the

Wattenberg field to the normal targeted formations, consisting of the Sussex, Codell, Niobrara, and J Sand shale formations, have been completed with hydraulic fracturing and hydraulic fracking is a standard and essential industry practice See deposition testimony of Murray Herring, pages 52-54, Exhibit F, attached hereto. *Id.* . In accordance with standard industry practice in the Wattenberg Field, TOP plans to utilize hydraulic fracturing as to the targeted formation(s) in all wells. See Herring Affidavit, Exhibit B, paragraph 5.

TOP will not and cannot economically drill and complete these wells without the ability to conduct hydraulic fracturing operations, which it is currently unable to do in view of Longmont's fracking ban. Id. Since the fracking referendum went into effect, TOP did apply for obtain a drilling permit from Longmont but in view of Longmont's permit condition that fracking is not permitted; TOP has not drilled the permitted well or any wells in Longmont. See Drilling Permit, attached as Exhibit A to TOP's Motion for Summary Judgment.. The only well drilled since November 2012 partially within Longmont was done by Synergy Resources, Inc. ("Synergy"). Synergy drilled a well from the Town of Firestone near to the border with Longmont and ran laterals into bottom hole locations with Longmont. However, because of the hydraulic fracturing ban, Synergy never completed and has yet to produce the portion of the well and minerals underlying Longmont. See Exhibit E, deposition of Ed Holloway, pp. 74-75.

6. Conflict between Longmont and State Rules as to Hydraulic Fracturing. There is a conflict between Longmont's fracking ban and the rules and policies followed by the Colorado Oil and Gas Conservation Commission (referred to as "the Commission" or the "COGCC"). As explained in Section III

below, this conflict is actual and direct: Longmont expressly prohibits hydraulic fracturing and the COGCC expressly allows hydraulic fracturing.

II. UNDER THE LAW OF IMPLIED PREEMPTION, LONGMONT IS PREEMPTED FROM REGULATING A TECHNICAL ASPECT OF OIL AND GAS OPERATIONS, SUCH AS HYDRAULIC FRACTURING

Most of the preemption cases decided by the Colorado courts concern local regulations that either incidentally affect oil and gas operations (like the so-called "land use coordination standards" designed to minimize conflicts between differing land uses considered in *Bd. of County Commissioners v. Bowen/Edwards Associates, Inc.*, 830 P. 2d 1045, 1061 (Colo. 1992)), or attempt to regulate land use aspects of oil and gas operations (like noise and visual impact, such as in. *Town of Frederick v. North American Resources Company*, 60 P. 3d 758, 761 (Colo. App. 2002)). In marked contrast to the above cases, the present case involves a local regulation that purports to directly prohibit a technical aspect and procedure of oil and gas operations, namely the hydraulic fracturing completion technique.

The most direct and applicable precedent to the Longmont fracking ban is the 2009 Colorado Supreme Court case of *Colorado Mining Association v. Board of County Commissioners of Summit County*, 199 P. 3d 718, 730 (Colo. 2009). At issue in this case was the validity of a Summit County ordinance that banned the use of toxic or acidic chemicals, such as cyanide, for mineral processing in mining operations. The state agency in charge, the Colorado Mined Land Board, did not issue any specific cyanide permits, as in the present case with respect to fracking, and had not promulgated any express regulations allowing the use of cyanide. However, as found by the Colorado Supreme Court, the Colorado

legislature had assigned to the state agency "the authority to authorize and comprehensively regulate the use of toxic or acidic chemicals, such as cyanide, for mineral processing in mineral operations, a field identified by the legislature." *Id*. at 722. Similarly, in the present case, under the Colorado Oil and Gas Conservation Act, the Colorado Legislature has expressly provided for the Commission's authority to regulate "drilling, producing … and all other operations for the production of oil or gas", "[t]he shooting and chemical treatment of wells", and "[o]il and gas operations so as to prevent and mitigate adverse environment impacts". C.R.S. Section 34-60-106(2) (a), (2) (b), (2) (d).

Based on the finding that the Colorado legislature had assigned to the state agency the field of regulating the technical issues as to the use of chemicals in mining operations, the Supreme Court struck down the Summit County ordinance on the grounds of implied preemption: The Court held, in pertinent part, as follows:

> Application of the preemption analysis we utilized in *Voss, Ibarra, Banner Advertising*, and other cases leads to the conclusion that Summit County's ban on the use of cyanide or other toxic or acidic regents for mineral processing impermissibly conflicts with the MLRA [Mined Land Reclamation Act], resulting in the implied preemption of the Summit County ordinance. *Id.*

This finding of implied preemption as to technical local regulations is on all fours with the present case.

Colorado Mining Association v. Board of County Commissioners of Summit County, 199 P. 3d 718, 730 (Colo. 2009) is not only binding and recent precedent from the Colorado Supreme Court, but, in addition, is consistent with the holdings in oil and gas preemption decisions relating to the lack of local authority to

regulate technical aspects of oil and gas operations. For example, in *Bd. of County Commissioners v. Bowen/Edwards Associates, Inc.*, 830 P. 2d 1045 (Colo. 1992), the Supreme Court noted the need for uniform state regulation of the technical aspects of drilling while allowing local regulation of traditional land use matters, stating as follows:

> [P]reemption may be inferred if the state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest…
>
> There is no question that *the efficient and equitable development and production of oil and gas resources within the state requires the uniform regulation of the technical aspects of drilling*, pumping, plugging, waste prevention, safety precautions, and environmental restoration.… The state's interest in uniform regulation of these and similar matters, however, does not militate in favor of an implied legislative intent to preempt all aspects of a county's statutory authority to regulate land use within its jurisdiction.…(Emphasis added.) *Id*. at 1056, 1058.

In *Town of Frederick v. North American Resources Company*, 60 P. 3d 758, 761 (Colo. App. 2002), the Colorado Court of Appeals noted that under Colorado law, only 'nontechnical aspects' of oil and gas operations are subject to local regulation, stating as follows:

> The *Bowen/Edwards* court did not say that the state's interest 'requires uniform regulation of drilling' and similar activities. Rather, according to the court, it 'requires uniform regulation of the *technical aspects* of drilling' and similar activities. The phrase 'technical aspects' suggests that there are 'nontechnical aspects' that may yet be subject to local regulation. *Id*. at 763.

Proper application of the above holdings to the present case compels a conclusion that the Longmont prohibition on hydraulic fracturing is invalid under the doctrine of implied preemption, because it impermissibly attempts to regulate a technical aspect of oil and gas operations, the regulation of which is exclusively

assigned to the uniform control of the Colorado Oil and Gas Conservation Commission.

III. LONGMONT'S FRACKING BAN IMPERMISSABLY CONFLICTS WITH STATE RULES AND POLICIES AND IS INVALID AND PREEMPTED AS A MATTER OF LAW

Should the Court not find that the Longmont ban on hydraulic fracturing is invalid under the doctrine of implied preemption, then the Court must then undertake the analysis of whether an impermissible operational conflict exists between the Longmont ordinance and state rules and policies. This analysis is a two step process and examines (1) whether the local regulation affects a matter of state concern (exclusive or mixed concern) and (2) if there is a conflict between the local and state rule. If both conditions are present, then the state rule preempts and invalidates the local rule.

A. COLORADO HAS A SUBSTANTIAL STATE INTEREST IN UNIFORM REGULATION OF OIL AND GAS OPERATIONS

The law is firmly established in Colorado that oil and gas regulation is a matter of state concern and interest. Both the legislature and the Courts have unequivocally recognized that the state has a substantial interest in regulation of oil and gas operations In particular, the Colorado Supreme Court cases and the legislation have recognized the state's strong interest in the uniform, efficient and fair development of oil and gas resources and, regardless of where located, and in protecting the coequal and correlative rights of mineral owners and producers throughout the state to a fair share of the production profits. *See Voss v. Lundvall Brothers, Inc.*, 830 P. 2d 1061 (Colo. 1992) and *Bd. of County Commissioners v. Bowen/Edwards Associates, Inc.*, 830 P. 2d 1045 (Colo.

1992); Oil and Gas Conservation Act, C.R.S. Section 34-60-101 et. seq.

Colorado has empowered the Colorado Oil and Gas Conservation Commission as the agency with the expertise, manpower, and authority to regulate oil and gas development and effects upon safety and the environment and throughout the state, including as to all downhole operations like hydraulic fracturing. Since passage of the Oil and Gas Conservation Act in 1951 and continuing with amendments throughout 2013, the Colorado Legislature has expressly provided for the Commission's authority to regulate "drilling, producing and all other operations for the production of oil or gas", "[t]he shooting and chemical treatment of wells", and "[o]il and gas operations so as to prevent and mitigate adverse environment impacts". C.R.S. Section 34-60-106(2) (a), (2) (b), (2) (d). As set forth in more detail below, in accordance with this statutory authority, the Commission has enacted comprehensive rules and regulations governing oil and gas operations, expressly including and permitting hydraulic fracturing operations. Accordingly, as found in the above cited cases and in accordance with the above statute, it is established that the matter of regulation of oil and gas operations is a matter of state concern, either on an exclusive state or mixed state and local concern.

B. THE COLORADO OIL AND GAS CONSERVATION COMMISSION EXPRESSLY ALLOWS AND REGULATES HYDRAULIC FRACTURING

The argument made by Longmont and Citizens' Intervenors that the COGCC does not regulate hydraulic fracturing operations is frankly ludicrous and without any basis in law or fact. Indeed, there can be no factual dispute that

pursuant to the authority delegated to the Commission, the Commission allows and regulates like other oil and gas operations, hydraulic fracturing of all oil and gas wells in Colorado, including wells located in Longmont. Indeed, on December 13, 2011, as indicated in the Report of Commission attached as Exhibit C to TOP's Motion for Summary Judgment, the Commission completed a lengthly rule making as to hydraulic fracturing. See Exhibit C., p. 9., stating "A major reason for adopting the new rules and amendments was to address concerns regarding hydraulic fracturing". As indicated in Exhibit C, the Commission's decision to allow hydraulic fracturing was done in its capacity as the agency with the expertise to regulate oil and gas operations, was based on substantial scientific study and on "discussions with those intergovernmental organizations, as well as other states, industry associations, individual operators, and conservation groups" and to "strike a reasonable balance'. *Id*. p. 10.

It is proper for the Court to defer to the balance struck by and administrative expertise of the COGG and entirely improper for the Court, in this proceeding, to decide upon the wisdom of allowing hydraulic fracturing. Not a single preemption decision by the Colorado courts have ever held that it is the trial court's function to question and substitute its judgment for the regulatory determinations made by the state agency, such as to the safety, need for, and environmental consequences of a particular oil and gas operation. Longmont and the Citizens' Intervenors have expended page upon page of argument and factual claims as to the safety, local environmental effects, property value effects, and alternatives to hydraulic fracturing. These arguments and evidence

are entirely irrelevant to and have never been considered by the courts under a proper preemption analysis. While TOP vigorously disagrees with most, if not all, of Defendant's environmental contentions, in view of their irrelevance, it is beyond the scope of this Reply to address and refute these contentions.

Defendants correctly state that the Commission does not require a separate permit to conduct hydraulic fracturing. However, the fact that the Commission does not require a separate permit for a particular operation is irrelevant and does not mean it is not subject to regulation. Indeed, the Commission regulates virtually all oil and gas operations, including surface configuration and related set backs, the installation of casing and tubing, drilling operations, perforating, and completion pursuant to two general permits, namely the Form 2A Oil and Gas Location Assessment and the Application for Permit to Drill. See Rules 303 and 305 of the Colorado Oil and Gas Conservation Commission.

These two forms are based on compliance with the numerous rules adopted by the Commission to ensure safety and prevent adverse environmental of all oil and gas operations, which apply to hydraulic fracturing. Such rules include requiring tests or surveys to determine the occurrence of water pollution, such as Braidenhead monitoring of the annulus between the production tubing and casing (Rule 305(c)(1)(iii)); requiring operators to install casing that satisfies specified quality and quantity requirements and to follow specified cementing procedures in order to protect and isolate groundwater formations (Rule 317A); groundwater monitoring to determine and prevent contamination (Rule 318A.4);

procedures for the disposal of fluids, including fluids used for hydraulic fracturing (Rule 325); preparation, interim reclamation and final reclamation of drill sites (Rules 1002, 1002, 1003), financial assurance requirements on operators, including for protection of surface owners (Rule 703), notices to and consultation with surface owners and local government representatives (Rule 316), creation of odors and dust from oil and gas operations, including as to sand used in fracking operations (Rule 805), noise abatement requirements (Rule 802), visual impact rules (Rule 804), protection of soil (Rule 706), disposal of waste and fluids (Rules 907 and 908); mitigation measures in certain circumstances, such as requiring closed loop systems as to fluids used in oil and gas operation (Rule 604); and procedures for inspection and enforcement of the Commission's rules.

Further, in addition to the general permits required for drilling a new well, hydraulic fracturing is regulated by numerous specific COGCC regulations. Commission regulations include requirements expressly applicable to hydraulic fracturing, including disclosure of chemicals used in hydraulic fracturing treatments (Rule 205), notice to landowners of the details of hydraulic fracturing treatments (Rule 305.E. (1)); advance written notice of any hydraulic fracturing treatments and completion of a specified Form 42 as to such treatments, a copy of which is also provided to the local governmental designee (Rule 316C), and the filing of a Completed Interval Report, Form 5A, which must contain the details of any hydraulic fracturing treatment.

In summary, the Commission expressly permits Operators to utilize hydraulic fracturing procedures on all wells in Colorado and regulates these and

related procedures through detailed and comprehensive rules, regulations, and drilling related permits.

C. THE CITY OF LONGMONT HAS BANNED ANY HYDRAULIC FRACTURING OPERATIONS AND STORAGE AND DISPOSAL OF RELATED WASTES FROM ANY LOCATION WITHIN LONGMONT.

In November 2012, Longmont passed Resolution R-2012-67. This Resolution contains an absolute and permanent ban on any hydraulic fracturing operations within Longmont and on the storage or disposal of wastes created in connection with the hydraulic fracturing process within Longmont. Since passage of this Resolution, Longmont has required as a condition of approval for any oil and gas well drilled in Longmont a ban on the use of any hydraulic fracturing ('fracking") techniques. See Exhibit A to TOP's Motion for Summary Judgment. Accordingly, Longmont unequivocally prohibits oil and gas owners from conducting fracking operations under all circumstances as to property located within Longmont, while the State of Colorado unequivocally allows fracking subject to compliance with regulatory requirements.

D. AN OPERATIONAL CONFLICT EXISTS WHEN A LOCALITY PROHIBITS AN OIL AND GAS OPERATION THAT THE STATE ALLOWS

The related argument made by Longmont and Citizens Intervenors there is no conflict between Longmont and the COGCC's rules as to hydraulic fracturing is equally ludicrous and without any foundation in law or fact. The Colorado courts have repeatedly recognized that operational conflict is not limited to situations in which the Commission issues an express permit for the activity in question and the requirements for the state permit conflict with local permitting

requirements. Rather, an operational conflict is deemed to exist where among other things, the locality bans a practice and the state allows the practice.

As held by the Colorado Supreme Court in *Bowen Edwards*, at 1060, an impermissible operational conflict exist when a local government imposes conditions on an oil and gas operation for which no such conditions are imposed under the state regulatory scheme, stating as follows:

> [T]he operational effect of the county regulations might be to impose technical conditions on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations or land restoration requirements contrary to those required by state law or regulation. To the extent that such operational conflicts might exist, the county regulations must yield to the state interest.

In the 2009 Colorado Supreme Court case of *Colorado Mining Association v. Board of County Commissioners of Summit County*, 199 P. 3d 718, 730 (Colo. 2009), a case also on all fours, the Colorado Supreme Court held that operational conflict exists when a county bans a methodology which the state has authorized a state agency to regulate, regardless of whether the state agency has adopted express regulations as to such a methodology or issued specific permits for use of a particular methodology. Although the state agency in charge, the Colorado Mined Land Board, had not issued any specific cyanide permits, as in the present case with respect to fracking, and had not promulgated any express regulations allowing the use of cyanide, the Court found nevertheless that an impermissible operational conflict existed, stating as follows:

> [A] local regulation and a state regulatory scheme impermissibly conflict if they "contain either express or implied

> conditions which are inconsistent and irreconcilable with each other." *Id*. at 725.

Similarly in the recent 2013 decision of the Colorado Court of Appeals in *Town of Milliken v. Kerr-McGee Oil & Gas Onshore, LP*, 2013 COA 72, 12 CA 1618 (Colo. App. 2013) the Court ruled that a finding of preemption based on operational conflict was not limited to circumstances in which the Commission had actually promulgated a rule or permit condition which expressly conflicted with the local regulation. Rather, the Court noted that sufficient conflict existed if the Commission had authority to regulate the matter, stating as follows:

> The relevant inquiry is whether the Town's inspections concern 'matters that are subject to rule, regulation, order or permit condition administered by the commission.' Section 34-69-106(5). The statute's plain language does not limit its application to matters on which the Commission has already promulgated rules, regulations, orders, or permit conditions, and we decline to read such a limitation into the statute. *Id* at p. 4.

The recent Colorado Supreme Court decision in *Webb v. City of Black Hawk*, 295 P.3d 480, 2013 CO 9 (Colo. 2013), holds similarly that preemption based on operational conflict exists if the home rule city's ordinance forbids what the state allows, stating as follows:

> In light of our conclusion that the regulation of bicycle traffic on municipal streets is of mixed state and local concern, we next look to determine whether Black Hawk's ordinance conflicts with state law. The test to determine whether a conflict exists is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes.

Applying these principles to the present case, based on the evidentiary record presented in the summary judgment filings, the conclusion is inescapable as a matter of law that a direct and actual conflict exists between state rules and

policies which allow hydraulic fracturing and Longmont's prohibition against hydraulic fracturing.

E. UNDER THE OPERATIONAL CONFLICT TEST, SINCE AN IRRECONCILABLE CONFLICT EXISTS BETWEEN THE STATE RULE AND THE LOCAL RULE IN AN AREA OF STATE CONCERN, THE LOCAL RULE MUST YIELD TO AND IS DEEMDED PREEMPTED BY THE STATE RULE

The policy behind the preemption doctrine in Colorado "is to establish a priority among potentially conflicting laws enacted by various levels of government." *Town of Carbondale v. GSS Properties, LLC,* 140 P. 3d 53, 59-60 (Colo. App. 2005); *Bd. of County Commissioners v. Bowen/ Edwards Associates, Inc*., 830 P. 2d 1045, 1057 (Colo. 1992). Given the clear conflict between Longmont and State of Colorado rules as to fracking operations, this case is a prime example of a conflict to be resolved under the law of preemption.

Contrary to the arguments raised by both Defendants, no Colorado preemption case has ever held that a plaintiff bears the burden to prove preemption beyond a reasonable doubt. Rather, the Colorado courts have uniformly held that the operational conflict test requires a declaration of preemption where local regulations materially impede the state interest, cannot be harmonized with state statute or regulation, or contain conditions which are inconsistent or irreconcilable with the state regulatory scheme. As stated in *Bowen/Edwards,* 830 P. 2d at 1059, "State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest." As stated in *Voss v. Lundvall Bros.*, 830 P. 2d 1061, 1069 (Colo. 1992), "We conclude that the state's interest in efficient oil and gas development and production throughout the state, as manifested in the

Oil and Gas Conservation Act, is sufficiently dominant to override a home-rule city's imposition of a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city limits". In Board *of County Commissioners of Gunnison County v. BDS International, LLC*, 159 P. 3d 773. 779 (Colo. App. 2006), the Colorado Court of Appeals applied the operational conflict test, as follows: "Where no possible construction of the County Regulations may be harmonized with the state regulatory scheme, we must conclude that a particular regulation is invalid."

In *Colorado Mining Association v. Board of County Commissioners of Summit County*, 199 P. 3d 718, 725 (Colo. 2009), the Colorado Supreme Court made it clear that in a matter of mixed concern, the state rule preempts the local rule if there is any conflict between the rules stating as follows:

> "Mere overlap in subject matter is not sufficient to void a local ordinance. However, a local regulation and a state regulatory statute impermissibly conflict if they" contain either express or implied conditions which are inconsistent or irreconcilable with each other." If a local ordinance affects a matter of statewide or mixed concern, then the state rule supersedes and preempts the local ordinance if there is any conflict between the different rules. *City of Northglenn v. Ibarra*, 62 P. 3d 151, 155, 163 (Colo. 2003); Webb *v. City of Blackhawk*, 295 P. 3d 496 (Colo. 2013); Voss *v. Lundvall Bros*, 830 P.2d at 1067.

The above determinations of state concern and operational conflict are usually made by the Court based on the evidentiary record presented on summary judgment without an evidentiary hearing, as in *Voss v. Lundvall Bros, Town of Frederick, and Gunnison County v. BDS.* In the present case, the determination of preemption should be made on summary judgment. In view of the established precedent that oil and gas regulation is a matter of substantial state concern, especially as to regulation of technical aspects of oil and gas

operations, and the overwhelming evidence that operational conflict exists between the Longmont statute which prohibits hydraulic fracturing and the rules, regulations, and policies of the COGCC, which expressly allow hydraulic fracturing on all wells in Colorado subject to compliance with regulatory requirements, summary judgment should be entered in Plaintiffs' favor.

II. SUMMARY

In summary, the City of Longmont's absolute and permanent ban on fracking operations within Longmont is preempted by state law and summary judgment should be entered invalidating this municipal resolution. For two separate reasons, this determination can and should be made without the need to take any evidence not deemed relevant by any Colorado preemption case, such as to the safety or environmental effects of fracking. First, as a matter of law, Longmont's attempt to prohibit a technical aspect of oil and gas operations like hydraulic fracturing is impliedly preempted and the field of regulation of the technical aspects of oil and gas operation is subject to the exclusive regulation of the Colorado Oil and Gas Commission. Second, Longmont has prohibited hydraulic fracturing, while the state oil and gas regulatory agency, the Colorado Oil and Gas Conservation Commission, expressly allows an operator to conduct fracking operations in all parts of Colorado. A direct and actual conflict exists between the law and regulations of Longmont and the law and regulations of the State of Colorado as to the ability to conduct hydraulic fracturing of oil and gas wells. In view of this direct and unquestionable operational conflict, the strong state policy in uniform regulation and in protecting the correlative rights of all

Colorado owners to obtain their fair share of oil and gas reserves and the well established judicial precedent that oil and gas regulation is a matter of exclusive state or mixed state and local concern, Longmont's ban must yield to and be deemed preempted by state law and regulation.

WHEREFORE, Defendant TOP Operating Company prays that summary judgment be entered, issuing a declaratory judgment that Longmont Resolution R-2012-67 is invalid and preempted by state law and an injunction enjoining the City from any further enforcement of this Resolution.

Dated this 24rd day of June, 2014.

ZARLENGO & KIMMELL, LLC
/s/ Thomas J. Kimmell
Pursuant to CRCP 121, Section 1-26(9) a duly signed original of this document is on file at the offices of Zarlengo & Kimmell, PC.

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Thomas J. Kimmell, Reg. No. 9043

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2014, I served a true and correct of the foregoing **TOP OPERATING COMPANY'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** via ICCES, addressed to the following:

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